The *First English Evangelical Lutheran Church* Case: What Did It Actually Decide?

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INTRODUCTION

On June 9, 1987, the United States Supreme Court issued its decision in the case of *First English Evangelical Lutheran Church v. County of Los Angeles*.[1] Voting six to three, the Court reversed a California state court judgment and held in favor of the Church in an inverse condemnation action in which the Church claimed that its property was "taken" without payment of just compensation by a temporary County flood protection zoning ordinance. The decision has been described in news media reports as a "landmark decision" and "a major victory" for landowners which is likely to have an enormous impact on local governments. Unfortunately, the media descriptions of the case have not always been accurate and a great deal of confusion has been generated as to what the Court actually decided and, equally as important, what it did not decide.

What the Court did decide was a narrow point of constitutional law regarding the Church's inverse condemnation claim.[2] In a nutshell, the Court concluded that the California Supreme Court had incorrectly interpreted the Constitution in *Agins v. City of Tiburon*[3]

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1. 107 S. Ct. 2378 (1987).

2. "Inverse Condemnation is a shorthand description of the manner in which a property owner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." 2 NICHOLS' THE LAW OF EMINENT DOMAIN, § 6.21 [1] (rev. 3d ed. 1985). The Church claimed that the County's temporary flood protection ordinance effected a taking because it denied all use of the Church's property, and thus the Church sought damages (compensation) in inverse condemnation for the "taking."

3. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

when it established a rule to the effect that a landowner who claims his property has been "taken" by a zoning or other land use regulation, may not sue for compensation in inverse condemnation, but must instead seek judicial invalidation of the offending regulation.[4] In the *First English* opinion, Chief Justice Rehnquist and the five Justices who joined with him disagreed with the *Agins* rule and held that the fifth and fourteenth amendments permit a landowner to sue for damages suffered during the time the offending regulation was in effect, until the regulation is finally determined by the courts to be a "taking." This period of time during which the offending regulation is in effect, but before it is declared to be a taking, was characterized by the Supreme Court majority as a "temporary taking."[5]

Before explaining this further, or speculating as to what the ruling's actual impact may be on zoning policies and practices, a review of the history of the temporary taking/remedy issue and how it came before the Court in this particular case will be helpful.

I.
CALIFORNIA'S *AGINS* RULE AND PREVIOUS UNITED STATES SUPREME COURT DECISIONS CONCERNING REGULATORY TAKINGS

Any discussion of the remedy question must begin with the case of *Agins v. City of Tiburon*.[6] The property owners in *Agins* brought an inverse condemnation action, alleging that a zoning ordinance amounted to a taking of their property because it limited development of their five acre parcel to no more than five single family dwellings.[7] The property owners had not applied for a development permit, but simply sued to recover the value of their property claiming that the mere enactment of the ordinance was a taking. The Court held that a property owner may not bring an inverse condemnation action for monetary compensation under such circumstances because requiring the local government to pay for the property (if the ordinance were held to be a taking) would have the effect of forcing the local government to exercise its power of eminent do-

4. The question regarding what type of suit may be brought is referred to as the "remedy question." It involves the issue of whether a monetary remedy should be allowed for "temporary takings" and is the central theme of the *First English* dispute.

5. 107 S. Ct. at 2387-89.

6. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

7. *Id.* at 271-72, 598 P.2d at 27, 157 Cal. Rptr. at 374.

main. The California Supreme Court considered that to be an improper judicial interference with the power of local government.[8] The proper remedy for a claimed regulatory taking, according to the *Agins* Court, was to bring a declaratory relief or mandamus action that seeks to have the ordinance declared invalid and unenforceable.

In *Agins*, the property owners did (in addition to their inverse claim) also assert a claim for declaratory relief by which they sought to have the zoning ordinance declared invalid. Because of that claim, the California Supreme Court went on to discuss the merits of the alleged taking, but eventually rejected the requested declaratory relief on the ground that the ordinance merely caused a diminution in the value of the property and thus, did not amount to a taking.[9]

On appeal, the United States Supreme Court agreed with the California Supreme Court that no taking had been adequately alleged because the ordinance, on its face, showed that some development of the property was permissible.[10] The Court also observed that because the property owner had not sought any development permit, there was no "concrete controversy regarding the application" of the zoning laws.[11] In any event, since the Supreme Court concluded that there was no regulatory taking, it was deemed unnecessary to consider whether the California Supreme Court's holding in *Agins* limiting the remedy for a regulatory taking to non-monetary relief was constitutionally correct.[12]

The remedy question was presented again in three subsequent United States Supreme Court decisions. In none of those cases, however, was the remedy question decided, for in each instance the Court stated that various procedural reasons prevented it from knowing whether a taking had actually occurred. In the first of those cases, *San Diego Gas & Electric Company v. City of San Diego*,[13] Justice Brennan wrote a dissenting opinion which was joined by three other Justices. The dissent expressed the view that the *Agins* rule (limiting a property owner's remedy to invalidation of a regulatory taking) was constitutionally inadequate because it did not compensate the property owner for loss of the use of his prop-

8. *Id.* at 275-77, 598 P.2d at 29-31, 157 Cal. Rptr. at 376-78.
9. *Id.* at 277-78, 598 P.2d at 31-32, 157 Cal. Rptr. at 378-79.
10. Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980).
11. *Id.* at 260.
12. *Id.* at 263.
13. 450 U.S. 621 (1981).

erty *during the time the regulation was in effect* until it was declared invalid.[14] The majority in the *First English* case essentially adopted the same view.

In the two cases that followed *San Diego Gas, Williamson County Regional Planning Comm'n v. Hamilton Bank*,[15] and *MacDonald, Sommer & Frates v. County of Yolo*,[16] various Justices who wished to reach the remedy question wrote dissenting opinions and expressed the view that the *Agins* rule was incorrect. By the time the *First English* case reached the Court, Chief Justice Rehnquist and Justices Brennan, White, Powell, and Marshall had all dissented from the *Agins* rule, though not all in the same case.[17] Thus, unless one of those Justices changed his mind, it appeared that the *Agins* rule would be held invalid once they all agreed that the remedy issue should be decided. In each of the four previous cases, however, beginning with *Agins*, a majority of the Justices exhibited an extreme reluctance to reach the remedy issue until the Court was presented with a case which involved an actual taking by regulatory action. That judicial restraint did not carry over to the *First English* case.

II.
THE *FIRST ENGLISH* CASE

A. The Subject Property and Its Destruction by Flood

The Church's property consists of twenty-one acres of land in the mountains north of Los Angeles, about twenty-three miles from the suburban city of Glendale, in a very narrow canyon known as Mill Creek Canyon. Mill Creek, which is a natural water course, flows through the canyon. The property lies within a national forest but it is privately owned and subject to the jurisdiction of the County of Los Angeles for building permit and zoning purposes.[18]

The property is zoned "R-R" (Resort and Recreation), which is a classification established to provide for outdoor recreation and agricultural uses suitable for development without significant impairment to the resources of the area. The County's General Plan maps

14. *Id.* at 651-61.

15. 473 U.S. 172 (1985).

16. 477 U.S. 340 (1986).

17. Justices Brennan, Marshall, Powell and Stewart dissented in *San Diego Gas*. Justices White, Burger, Powell and Rehnquist dissented in *MacDonald, Sommer*. Justice White was the only dissenter in *Williamson County*.

18. Brief for Appellee at 4-5, First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).

reserve the property for open space purposes including outdoor recreation and resource production and preservation. The Church has never challenged these classifications.[19]

The Church acquired the property in 1957 and over the next 20 years built various structures and recreational facilities on the premises, using mostly donated labor and services. The property, known as "Lutherglen," was used as a weekend retreat and summer camp for Church members and their guests and as a year-around camping facility for handicapped children and adults of all denominations. All of the structures except for some water tanks were located on twelve acres of relatively flat land at the bottom of the canyon, along both sides of Mill Creek. The structures consisted of: a single cabin which served as the residence of the caretaker, a main lodge used for dining and recreation, a dormitory or bunk house divided into two sections with attached shower and restroom facilities, a swimming pool, a volleyball court, an outdoor chapel, and a footbridge across the creek. There were also some moveable trailers on the property which were used to house the camp's staff.[20]

It is common knowledge in California that flash floods occur in the mountain canyons during periods of heavy rains and that such floods represent a serious hazard to human life and property. Indeed, when the structures were constructed on Lutherglen, the County required the Church to take measures to protect against flooding and erosion. These included the construction of a floodwall along one side of the property and the construction of the footbridge as a "breakaway bridge" which would separate easily from its foundation in the event of a flood to prevent a buildup and sudden surge of water downstream.[21] Despite these precautions, however, several of the structures on Lutherglen were severely damaged, though not destroyed, when a flood occurred in the canyon in 1969. At that time, the County allowed the Church to rebuild the damaged structures.

In late July of 1977, a fire occurred in the Angeles National Forest causing a major loss of watershed which, in turn, magnified the already existing danger of flooding in the Mill Creek area.[22] A flash flood hit between 1:30 and 2:30 in the morning of February 10, 1978, after two days of very heavy rain. It was devastating. A massive wall of water, mud and debris rushed down Mill Creek Can-

19. *Id.* at 19-23.
20. *Id.* at 4-5.
21. *Id.* at 6.
22. *Id.* at 7

yon, destroying all of the camps and other properties in the canyon bottom. Lutherglen's structures were totally obliterated. Ten people were killed on adjacent property.[23]

B. The County's Flood Protection Ordinances

On January 11, 1979, the County adopted the temporary flood protection ordinance which was the subject of the Church's suit.[24] The ordinance recited that it was "[a]n interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs."[25] The law took effect immediately as an emergency measure, "required for the immediate preservation of the public health and safety."[26] In fact, at the time of the flood, the County was already in the process of mapping and evaluating flood data for Mill Creek Canyon and other areas of the County, in order to comply with federal regulations under the National Flood Insurance Program.[27] As the ordinance itself recited, studies were underway to develop *permanent* flood protection areas for Mill Creek and other specific areas as part of a comprehensive floodplain management project.[28] The ordinance further stated that the restrictions which it imposed were necessary to prevent encroachments within the limits of the permanent flood protection area which would be "incompatible with the anticipated uses to be permitted within the permanent flood protection area."[29]

The ordinance was enacted under certain superseded statutory provisions of California law applicable to "interim zoning ordinances" which take effect immediately as urgency measures "to

23. *Id.* at 8.

24. Los Angeles County, Cal., Ordinance 11,855 (Jan. 11, 1979). See Appendix to this Article for the complete text of the ordinance.

25. *Id.*

26. *Id.*

27. The National Flood Insurance Program makes federally subsidized insurance available to landowners of parcels located in flood prone areas, if adequate local floodplain management laws have been enacted to minimize flood losses. 42 U.S.C. §§ 4001-4128 (1982); 44 C.F.R. §§ 60.1-.3 (1980). The federal regulations require local agencies to adopt floodplain management regulations which, *inter alia*, "[p]rohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway that would result in any increase in flood levels within the community during the occurrence of the base flood discharge." 44 C.F.R. § 60.3(d)(3) (1980).

28. Los Angeles County, Cal., Ordinance 11,855 (Jan 11, 1979).

29. *Id.*

protect the public safety, health and welfare."[30] Such measures expired automatically after four months unless they were extended. The maximum period of time such an ordinance could remain in effect, if so extended, was two years.[31] The County Board of Supervisors did extend the ordinance for the maximum period and then a permanent "flood protection district" was established by an ordinance adopted on August 11, 1981.[32]

The geographical boundaries of the permanent flood protection district were identical to those of the interim flood protection area which it superseded.[33] The affected area consisted of a linear shaped parcel approximately 250 feet in width and 3600 feet in length which followed the course of the existing creek channel and included additional area on both sides of the channel to provide reasonable protection from floodwater overflow, bank erosion and debris. Because of the narrowness of the Canyon at the Church's property, nearly all of the Church's twelve acres of flat land were included within the flood protection area.[34]

The provisions of the permanent ordinance were drafted to comply with the federal flood insurance regulations and the federal government has recognized that the local ordinance complies with those regulations. The ordinance's provisions are not as restrictive as those of the interim ordinance, but there is no doubt that they would prohibit the Church from restoring Lutherglen to its pre-flood state.[35] Since the Church has never applied for permission to build anything on the property under the permanent ordinance, it is not known with certainty what kinds of structures would be permitted by the County Engineer. The County's engineers, however, believe that some structures could safely be constructed on certain

30. CAL. GOV'T CODE § 65858 (Deering 1971).

31. *Id.*

32. Los Angeles County, Cal., Ordinance 12,423 § 1 (Aug.11, 1981).

33. *Id.*

34. Brief for Appellant at 2, *First English*, 107 S. Ct. 2378 (1987).

35. The permanent ordinance states that the area within the flood protection district has been designated by the County Engineer and the Los Angeles County Flood Control District as being subject to "substantial flood hazard." Los Angeles County, Cal., Ordinance 12,413, § 1 (Aug. 11, 1981). The ordinance prohibits the construction or reconstruction of any building or structure within the boundaries of the district except as specified therein. One of the exceptions permits "accessory buildings or structures that will not substantially impede the flow of water, including sewer, gas, electric and water systems approved by the County Engineer" pursuant to certain specific provisions of the County Building Code. LOS ANGELES COUNTY, CAL., BLDG. CODE § 308 (1981). Those provisions of the Building Code prohibit any construction in a severe flood hazard area, if such construction would increase the flood hazard to adjacent properties. Los Angeles County, Cal., Ordinance 12,413, § 1 (Aug. 11, 1981).

portions of the property in compliance with the permanent ordinance.[36] But they acknowledge that it would be more costly than if the Church were permitted to build where it did before, and it is not likely that the Church would be able to replace all of the structures that were destroyed.

Despite the ordinance's restrictions, which the County believes are essential for safety purposes, the County contends the property is still usable for recreation and camping purposes consistent with its underlying zoning classification. Many campgrounds are used in California with no structures at all, or with only restroom and shower facilities--which the County might permit the Church to build on Lutherglen as "accessory structures," if adequate safety precautions were taken.[37]

C. The Church's Suit and State Court Rulings

The Church did not wait to find out what type of structure might be permitted on Lutherglen under the permanent flood protection ordinance. Instead, it began its lawsuit on February 21, 1979, a little over a month after the temporary ordinance was first enacted. The Church sued both the County and the Los Angeles County Flood Control District, which was then a separate governmental entity, claiming that they were responsible for the damage caused by the February 10, 1978 flood under a variety of different legal theories, including inverse condemnation and tort liability.[38] In addition, the Church asserted an inverse condemnation claim against the County based on the allegation that the temporary flood protection ordinance "denied all use" of Lutherglen.[39]

While the case was still in the pleading stage, the County (which at that time was being ably represented by the County Counsel) moved to strike the allegations of the Church's complaint pertaining to the temporary flood protection ordinance.[40] *Agins* had just been decided by the California Supreme Court some three months

36. *See infra* note 37.

37. Brief for Appellee at 20-25.

38. The Tort claim charged that the Flood District engaged in cloud seeding during the storm that flooded Lutherglen. The first inverse condemnation claim was against the County Road Department and claimed that certain work done by them caused the flood damage to be more severe than it otherwise would have been. The second inverse condemnation action (discussed in this article) was against the County of Los Angeles for the regulatory taking claim based on the temporary ordinance. First English Lutheran Church v. County of Los Angeles and Los Angeles County Flood Control Dist., No. B003702, slip op. at 16-17 (D. Cal., June 25, 1985).

39. Brief for Appellant at 2, *First English*, 107 S. Ct. 2378 (1987).

40. *First English*, No. B003702, slip op. at 4 (D. Cal., June 25, 1985).

earlier, and the County argued that the *Agins* remedy rule barred the Church from suing in inverse condemnation for monetary damages for an alleged regulatory taking.[41] Under *Agins*, as discussed, the correct remedy was to sue to invalidate the ordinance in a declaratory relief or mandamus action, which the Church had not done.[42]

The trial court agreed with the County's position and struck the allegations of the Church's complaint dealing with the temporary flood protection ordinance as being contrary to the *Agins* rule.[43] The case was not appealed immediately, however, because of the presence of the Church's other claims (including the tort claim). Eventually, after a trial on one of the other claims, a judgment was entered for the County and the Flood Control District on all of the Church's various theories of liability.[44] The case was then taken to the California Court of Appeals.[45]

By the time the case reached the California Court of Appeals, *Agins* had been affirmed by the United States Supreme Court, and the *San Diego Gas*[46] case had also been decided; neither case, however, reached the remedy question. But based on the dissent in *San Diego Gas* and Justice Rehnquist's concurring opinion, the Church argued to the California Court of Appeals that a majority of the Justices opposed the *Agins* remedy rule.[47] The California Court of Appeals disagreed and held that until the United States Supreme Court finally decided the question, it was obligated to follow the remedy rule set forth by the California Supreme Court.[48] Relying squarely on *Agins*, the appellate court affirmed the lower court's order striking the inverse condemnation claim relating to the temporary flood protection ordinance.[49]

It is important to note that neither the lower court nor the California Court of Appeals ever discussed the sufficiency of the Church's allegations to state a claim for a regulatory taking.[50]

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41. Brief for Appellee at 39.

42. Agins v. City of Tiburon, 24 Cal. 3d 266, 273, 598 P.2d 25, 28 157 Cal. Rptr. 372, 375 (1979) *aff'd on other grounds*, 447 U.S. 255 (1980).

43. *First English*, No. B003702, slip op. at 4, 14 (D. Cal., June 25, 1985).

44. *Id.*

45. *Id.*

46. San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981).

47. Brief for Appellant at 13, *First English*, 107 S. Ct. 2378 (1987).

48. *First English*, No. B003702, slip op. at 16 (D. Cal., June 25, 1985).

49. *Id.*

50. Since the Church never sought to amend its complaint to state a claim for declaratory relief of mandamus, as permitted under the *Agins* rule, the California courts were not required to consider whether the Church had alleged sufficient facts to estab-

Likewise, they did not address the health and safety justification for the County's temporary flood protection ordinance.[51] In essence, both California courts regarded the Church's allegations as being irrelevant regardless of whether they were legally sufficient to state a claim, because the Church had sought an impermissible remedy. It was this procedural quirk that the United States Supreme Court majority seized upon to justify reaching the remedy question in *First English* after avoiding it in four previous cases.

D. The Appeal to the United States Supreme Court and the County's Contentions

After the Church's petition for a hearing in the California Supreme Court was denied, leaving the decision of the California Court of Appeals to stand as the final state court ruling in the matter, the Church then appealed to the United States Supreme Court, invoking that Court's appellate jurisdiction rather than *certiorari* jurisdiction. Whereas *certiorari* jurisdiction is entirely discretionary with the Court, it must hear appeals if the requisite conditions for appellate jurisdiction are present.[52] In essence, appellate jurisdiction exists whenever a state statute or local government ordinance is challenged as being repugnant to the United States Constitution and is upheld by a state court as being constitutional.[53]

As noted previously, five of the sitting Supreme Court Justices had already indicated their disagreement with the *Agins* rule in various dissenting and concurring opinions,[54] and so it appeared that the Court would probably decide that the *Agins* rule was incorrect if a majority of the Justices voted to reach the remedy issue. But the County believed that this case was not the appropriate vehicle for the Court to decide what the proper remedy should be for a regulatory taking, for many of the same reasons which were given by the Court in the four previous cases.[55] In addition, of course, the ordinance in this case was strictly a health and safety measure, unlike

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lish a regulatory taking, as the courts did in *Agins*. Nor did the Church ever amend its complaint to claim a regulatory taking based on the permanent flood protection ordinance. At all stages of the proceeding, the suit was solely based on the temporary ordinance, even though it no longer existed when the case went up on appeal

51 *See infra* note 57.

52 28 U.S.C § 1257(2) (1982).

53. One of the arguments made on behalf of the County in the Supreme Court was that the jurisdictional requirements for appellate jurisdiction were not present here, but the Supreme Court majority disagreed.

54. *See supra* note 17

55 Brief for Appellee at 14

the zoning ordinances involved in the previous four cases. Accordingly, the County's main strategy, and that of all of the numerous *amici curiae* who filed briefs supporting the County's position, was to persuade the Court that it should affirm the decision of the California courts without deciding the remedy issue.

In addition to making various jurisdictional and procedural arguments, the County and its *amici* argued forcefully that because the County's flood protection ordinance, on its face, only prevented a hazardous use of property (building in a floodplain), there could be no unconstitutional taking as a matter of law.[56] The County pointed out that under the Court's precedents going back at least one hundred years, reasonable regulations prohibiting only dangerous uses of property are not considered to be takings for a public purpose in the constitutional sense, and compensation to the affected property owner is not required.[57]

The County argued that the safety purpose of the ordinance was well established by facts in the record and by other facts which the Court could properly consider by way of judicial notice, including the provisions of the temporary and permanent ordinances themselves, and the findings of the County Planning Commission supporting the permanent ordinance.[58] To strengthen the argument, it was pointed out that the Court itself had recognized in previous decisions that health and safety ordinances are entitled to special consideration and carry with them a presumption of validity which can be overcome only by a showing that the ordinance was actually adopted for some other improper purpose, or that it imposes restrictions which are more onerous than what is reasonably needed to meet the particular peril.[59] The Church alleged no facts which would overcome this presumption of validity.

Another major argument advanced by the County and its *amici* was that the County had *not in fact denied all use* of the property to the Church. The Church had sued solely on the temporary ordinance which did no more than temporarily prohibit the building of

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56. *Id.*

57. Health and safety regulations have a presumption of validity and, as mentioned, are not considered to be "takings." The cases relied upon are all cited with approval by Justice Stevens in his *First English* dissent 107 S. Ct. at 2391 n.4. The most recent case on the subject, Keystone Coal Association v. De Benedictis, 480 U.S. 470 (1987), was decided only three months prior to *First English*. The County believed that *Keystone* fully supported its position, just as Justice Stevens stated in his dissent in *First English*.

58. Brief for Appellee at 16, 29-38.

59. *Id.* at 26, *citing* Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 603, 55 Cal. Rptr. 710, (1967).

any structures in the canyon bottom until the matter could be studied and a permanent ordinance adopted.[60] The Church did not allege any facts showing why its property could not still be used without structures for recreational purposes, including camping. Futhermore, as mentioned previously, the subsequent permanent ordinance, which the Church never challenged, plainly allowed some structures ("accessory structures") to be built, if the County Engineer were satisfied that adequate safety measures could be employed.[61]

Finally, the County urged that if the Court should decide to reach the remedy question in this case, it should hold that the *Agins* rule was correct.[62] The County argued that a property owner should not be able to sue immediately for compensation in inverse condemnation for an alleged regulatory taking, but rather should be required to sue to have the regulation invalidated for all of the reasons given by the California Supreme Court. Also pointed out was that the question of whether a property owner should be compensated for the loss of use of his property during the period the regulation was in effect (prior to its being declared invalid) was never actually raised or decided in *Agins* or in the present case because in neither case was it decided that a taking was effected. The County, and all of its *amici*, argued that to call that temporary loss of use of the property a "temporary taking" was a misnomer, because it was not really a "taking" at all under the Court's many earlier precedents.[63]

Based on those existing precedents, the County argued that a zoning ordinance or other land use regulation should not be regarded as having gone "too far" so as to amount to a taking unless it denies substantially all use of the land to the property owner *permanently*. Anything short of that is a *mere diminution in value*, and it has long been recognized that even a *substantial* diminution in value (where some value remains) is not the equivalent of an appropriation of the property for a public purpose.[64] The temporary loss of use of the property during the time an excessive regulation is in

60. Los Angeles County, Cal., Ordinance 11,855 (1979).

61. *See supra* note 37

62. Brief for Appellee at 39-42.

63. *Id.* at 43-45.

64. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. at 260-61; Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 131 (1978); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 373-74 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915). *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493-97 (1987), decided after oral arguments in *First English*.

effect imposes no economic burden on the landowner different from that which must be borne because of numerous other kinds of delays in development inherent in the regulatory process. Delays of that nature have never been considered takings, for they represent, at most, a mere diminution in the value of the property, as distinguished from a total destruction of all value.[65]

E. The Supreme Court's Decision and Rationale and the Unanswered Questions Which Remain

The Supreme Court majority agreed with the Church's argument that the remedy question was ripe for decision in this case even though it had never been decided whether a taking had occurred.[66] The Court expressly rejected the County's argument that the Court should itself evaluate the allegations of the complaint to determine whether a "taking" had been adequately alleged.[67] The Court reasoned that, because the California courts had relied on the *Agins* rule as the sole basis for their decision, they must have *assumed* that the Church's bare allegation of a denial of all use of Lutherglen sufficiently alleged a taking, at least for purposes of raising the remedy question.[68] The Supreme Court, therefore, also felt that it could do the same thing (that is, assume the ordinance was a taking in order to reach the remedy issue). The Court then decided that the California interpretation of the *Agins* rule was incorrect.[69] In so doing, however, the opinion by Chief Justice Rehnquist makes it abundantly clear that the majority was not deciding whether the County's temporary flood protection ordinance actually denied all use of the property—that is, whether it actually effected a taking.[70] The Court further stated that it was not deciding whether the ordinance was insulated from the taking claim as part of the County's authority to enact health and safety regulations.[71] Those issues, it said, would have to be decided on remand to the state courts.[72]

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65. Brief for Appellee at 44.
66. *First English*, 107 S. Ct. 2378, 2384 (1987).
67. *Id.* at 2384-85.
68. *Id.*
69. *Id.* at 2387-89.
70. *Id.* at 2384-85.
71. *Id.* at 2389.
72. The exact language of the Court's opinion on this point reads as follows:

We reject appellee's suggestion that, regardless of the state court's treatment of the question, we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question. However "cryptic" — to use appellee's description — the allegations with respect to the taking were, the California courts deemed them sufficient to present the issue. We accordingly have

With respect to the remedy issue, the Supreme Court interpreted the California Court of Appeals' decision in this case as holding that a landowner who claims his property has been taken by a land use regulation may not recover damages for the period of time before it is finally determined that the regulation constitutes a taking of his property.[73] Actually, as previously mentioned, that precise question was not presented or decided in this case or in *Agins*. Nevertheless, the Supreme Court considered that to be the real issue—that is, whether the *Agins* rule was wrong on the ground that the Constitution mandates the payment of compensation for the period of time *prior* to a judicial determination that the subject regulation (if allowed to stand) would effect a taking.[74] On that issue, the Court rejected all of the County's arguments as to why there is no taking where nothing more than a temporary loss of use of the property, or a delay in development of the property, has occurred. The majority said it could see no difference between a temporary denial of all use of the property and a permanent taking.[75] The Court reasoned that if compensation was required for a temporary *physical* taking, then compensation must also be paid for a temporary *regulatory* taking.[76]

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no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the County might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. See, *e.g.*, *Goldblatt v. Hemptead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887). These questions, of course, remain open for decision on the remand we direct today.* 107 S. Ct. at 2384-85 (emphasis added) (parallel cites omitted). In contrast, the dissent by Justices Stevens, O'Connor and Blackmun was extremely critical of the majority's decision precisely because the majority decided the remedy issue in a case where the dissenters believed it was clear that no taking could possibly have occurred. As Justice Stevens put it,

> Even though I believe the Court's lack of self-restraint is imprudent, it is imperative to stress that the Court does not hold that appellant is entitled to compensation as a result of the flood protection regulation that the County enacted. No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court's precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking.

Id. at 2391.

73. *Id.* at 2382-83.

74. *Id.*

75. *Id.* at 2388.

76. The dissenting opinion by Justice Stevens agreed with the County's argument that there is a significant difference between a physical taking of property and one which occurs solely by virtue of restraints on the use of property imposed under a land use regulation; and that no regulatory taking should be found to occur where there has been a *diminution in value* caused by a *temporary* loss of all use of property, as distinguished from a total destruction of value which would result from a *permanent* loss of all use. *Id.* at 2393-96.

The majority concluded, however, by saying "[w]e limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[77] What this means is anything but clear, since the Court had already said earlier in its opinion that it was not deciding whether there was a taking in this case. Equally unclear is whether the Court meant to use the term "temporary taking" to mean something broader than the period of time prior to the invalidation or abandonment of an excessive regulation—which was what Justice Brennan was talking about in *San Diego Gas*.[78]

One possible interpretation of the majority opinion would be that *any* temporary land use restriction which denies all use of the affected property during the time the restriction is in effect must be regarded as a taking for which compensation must be paid, no matter how short in duration the loss of use may be or what the reasons are for the temporary restriction. If that is what it means, it would seem that all legitimate building moratoria and other kinds of proper and necessary interim ordinances restricting land use might be vulnerable to attack and could result in liability for the adopting public entity. But it seems unlikely that a majority of the Court would so hold if it were faced with such a question. Once the Court is put in a position of having to decide whether a taking has actually occurred in a particular situation involving a temporary land use restriction, it is likely that the Court will modify, or at least clarify, some of the overbroad language it used in this case and bring the decision more in line with some of the Court's previous holdings on the subject of regulatory takings, including *Penn Central*, *Agins* and *Keystone*.[79]

Assuming there is a legitimate purpose for a temporary land use restriction, and that the restriction is not to remain in effect for an undue length of time or for an indefinite period, the Court should hold that there is no taking because nothing more than a diminution in value has occurred. Since there is no total destruction of the value of the property, the public interest should be deemed to out-

77. *Id.* at 2389.

78. In his *San Diego Gas* dissent, Justice Brennan emphasized that even "temporary takings" should be compensable. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653-660 (1981).

79. In all three of those cases, as previously discussed, the Court held that declaratory relief (an attempt to invalidate the ordinance) would be the proper first step.

weigh the private interest. In essence, this should be regarded as a "normal delay" in the right to develop property of the type that must be expected in a regulated society. Certainly this should be the result in any case where the Court considers the three *Penn Central* factors used to determine the "reasonableness" of governmental action in takings issues.[80]

Hopefully, some of the unanswered questions and uncertainties created by the majority opinion will be resolved in later court rulings. In the meantime, land use planners certainly must be more circumspect about the consequences of their actions, but at the same time they should guard against becoming overly cautious. Good zoning practices which did not "take" property prior to the *First English* case should remain perfectly safe, as well as desirable, in the aftermath of that decision.

80. In order to determine whether a regulation has gone "too far," the Court identified three relevant factors: (a) the character of the governmental action; (b) the economic impact of the regulation on the claimant; and (c) the extent to which the regulation had interfered with distinct investment-backed expectations. Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978).

APPENDIX

COUNTY ORDINANCE NO. 11,855*

An interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs, declaring the urgency thereof and that this ordinance shall take immediate effect.

The Board of Supervisors of the County of Los Angeles does ordain as follows:

Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, and portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though fully set forth.

Section 2. Violation of this ordinance is punishable by a fine of not more than five hundred dollars ($500) or imprisonment in the County Jail for a period of not more than six (6) months or by both such fine and imprisonment. Each day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted, constitutes a separate offense.

Section 3. If any provision or clause of this ordinance or the application thereof to any persons or circumstances is held invalid, such invalidity shall not affect other provisions or application of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

Section 4. Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area. If this ordinance does not take immediate

* Los Angeles County, Cal., Ordinance 11,855 (Jan. 11, 1987).

effect, said uses will be established prior to the contemplated ordinance amendment once established may continue after such amendment, has been made because of the provisions of Article 9 of Chapter 5 of Ordinance No. 1494.

By reason of the foregoing facts this ordinance is urgently required for the immediate preservation of the public health and safety, and the same shall take effect immediately upon passage thereof.